

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 43 of 2004

with

CRIMINAL MISC.APPLICATION No 224 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS

and

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgement? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

DINESHBHAI LAKHMANBHAI PARMAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 43 of 2004
MR YOGESH S LAKHANI for Appellant
MR RC KODEKAR, APP for Respondent No. 1
 2. Criminal Misc.Application No. 224 of 2004
MR YOGESH S LAKHANI for Applicant
MR RC KODEKAR, APP for Respondent No. 1
-

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS

and

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 16/12/2004

COMMON ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

In this appeal, the appellant has challenged his conviction under Sec.302 of IPC and the order of sentence for life imprisonment imposed by the Addl.Sessions Judge and Fast Track Court No.6, Rajkot, in Sessions Case No. 57 of 1998 vide judgment dated 7th Nov.2003. While deciding the application u/s.389 of the Cri.Pro.Code it appeared to us that even prima facie conviction recorded u/s.302 of the I.P.Code was not proper. With the consent of learned Advocates parties, we have heard this matter finally. R&P is present in the Court.

2.1 The case of the prosecution, in nutshell, can be stated as under:

2.2 Deceased Nazabhai Alabhai was related to one Gitaben wife of the present appellant. Due to constant quarrel between the couple, the appellant and Gitaben got separated and she started staying at her parental house. Efforts were made to either settle the dispute or to secure divorce between the parties and in one of such efforts, deceased Nazabhai took part. However, it was disliked by the appellant since he entertained an impression that it was the deceased who did not want to see the parties patching up their disputes. With this grudge in mind, on the day of incident, i.e. on 9th Dec.1997 at about 1.30 a.m. the deceased was standing at Kuvadva bus stand, near City of Rajkot and while he was placing diesel can in his six seater Rickshaw (Chhakado), the appellant went to him and inflicted knife blow on his abdomen. He was thereafter removed to the hospital for treatment at Rajkot, where he succumbed to his injuries on 14th Jan.1998. One Alabhai Parmar filed the complaint against the appellant before Rajkot Taluka Police Station, which registered the offence at CR No.886 of 1997 initially under Sec.307 of IPC, but subsequently upon the death of the deceased, it was altered to one under Sec.302 of IPC. The Investigation commenced and after completion of the same, chargesheet was submitted in the Court of learned Magistrate, at Rajkot, who in turn, committed the case to the Court of Sessions, since the offence under Sec.302 is exclusively triable by the Court of Sessions.

2.3 At the trial, the learned Judge framed the charge at Exh.1 on 23rd June 1998 and the appellant pleaded not guilty and claimed to be tried.

2.4 During the course of the trial, the prosecution examined 18 witnesses and also produced documentary evidence to substantiate its case against the appellant.

After recording of the oral evidence, the trial Court recorded the further statement of the appellant under Sec.313 of the Cr.PC. His defence appears to be of general denial and he has not pleaded any specific defence.

2.5 At the end of the trial, the learned Judge convicted the appellant for the offence under Sec.302 of IPC and sentenced him to suffer imprisonment for life and to pay Rs.5,000/-, in default, to undergo rigorous imprisonment for one year. The learned Judge also convicted him for the offence under Sec.135 of the Bombay Police Act, but did not award any separate sentence from the same.

3. We have perused the record of the appeal and we have also heard Mr.Y.S.Lakhani, learned Advocate for the appellant and Mr.R.C.Kodekar, learned APP for the respondent State.

3.1 Mr.Lakhani has not challenged the involvement of the appellant in the incident. He has, however, vehemently submitted that so far the finding given by the trial Court holding the appellant guilty under Sec.302 of IPC is concerned, in the facts and circumstances of the case, it is absolutely erroneous and deserves to be set aside. He has submitted that looking to the fact that only one injury was inflicted by the appellant to the deceased and the victim survived for 35 days, it clearly shows that the appellant did not have any intention to inflict fatal injury. He has further submitted that the cause of death is Septicaemia which got developed during the course of treatment. Therefore, the offence, at the most, may fall either under Sec.304 Part-II or under Sec.326 of IPC. As against that, Mr.Kodekar has supported the trial Court's judgment and has submitted that considering the fact that the dangerous weapon like knife has been used and the injury is caused on the vital part of the body, the intention can easily be culled out and it cannot be any other intension but to cause death of the deceased and hence the appellant is rightly held guilty for offence u/s.302 of the I.P.Code.

4. We have carefully gone through the evidence with a view to re-appreciate the same. Since Mr.Lakhani has not challenged the involvement of the appellant, we do not discuss the evidence of the two eye witnesses, namely, Alabhai, the complainant and Malabhai Khodabhai. We have, however, carefully perused their evidence which amply proves the involvement of the appellant in the present incident.

5. However, the question that is required to be decided is whether the conclusion drawn by the trial Court is proper or not. For that purpose, our attention to the medical record is invited. There is no dispute that the deceased died after 35 days of the injury of the injury received by him. It is also not disputed that he died of Septiceamia. The prosecution has examined two Medical Officers and has also placed reliance on the post mortem notes. When the deceased was removed to Rajkot Hospital on 9th Dec.1997 in the injured condition on the day of the incident, Dr.Jayantilal Harjiwan Karia, PW11-Exh.41 was on duty. He has deposed that at about 11.35 a.m., Nazabhai Alabhai was brought to him for treatment. He has further stated that the injured informed him that he was assaulted with knife at Kuvadva bus stand, but by some unknown person. Upon examination, this witness had found one punctured wound on the right side of the stomach of the size of 1" x 1" and cavity deep. He also noticed that about 5" of the intestine was protruding from that wound. The patient was removed to Ward No.6 where his treatment was started. The evidence further shows that the deceased had left the hospital on 9th Dec.1997 against the medical advice. This witness has produced the case papers of the deceased at Exh.42 and the medical certificate at Exh.43. In his opinion, the injury could be caused with sharp edged weapon like the muddamal knife. He has also opined that looking to the injury, he was in a position to say that the said injury could be caused by such knife. In his opinion, the injury was sufficient, in ordinary course of nature to cause death. In the cross examination by the defence, he has denied the suggestion that incise wound and stab wound are different types of wounds. He, however, further stated when it was suggested to him that in the medical jurisprudence by Modi, they are referred to as separate wounds, he has replied that it might have been so stated. He has also deposed that the history noted down in the case papers to the effect that some unknown person had inflicted knife blow on him on the basis of the information given by the victim himself, the victim, according to him, was fully conscious at that time. He has thereafter described the course of treatment in response to the questions put to him in the cross examination.

5.1 Dr.Manish Kantibhai Gosai is the Medical Officer who performed the post mortem examination of the deceased. In his examination in chief, he has stated that on 14th Jan.1998, he was attached to Rajkot Civil Hospital as Medical Officer. At about 9.00 p.m. the

dead body of Nazabhai was brought for post mortem examination. He commenced autopsy on 15th Jan.1998 at about 6.00 a.m. and completed it at 7.00 a.m. He has described the injuries which were noticed by him on the body of the deceased. It appears that most of the external injuries mentioned by him are of the operation performed on the deceased during the treatment. So far as internal injuries are concerned, he has stated that the operation of Gastrotomy and Zenjunostomy was performed. He had also noticed a hole between second and third part of Deodenal. He has further stated that all the injuries described in his evidence were individually sufficient to cause death. He has further stated that the injuries were caused to the Intestine and stomach. According to him, all the injuries cumulatively as well as individually are sufficient to cause death. He has also stated after seeing the knife, that such injury could be caused by such weapon. In the cross examination, however, he has stated that he was not in a position to say for definite as to from which weapon the internal injury was caused. In other words, according to him, whether it was caused on account of the operation or the assault. This witness further stated that Septiceamia would be caused for various reasons. In his opinion, if the patient suffers from Diabetes, he can develop Septiceamia or if the patient is anaemic, or if the apparatus are not properly sterilised or if the post-operative care is not properly taken or if the anti-biotics are not administered in proper quantity, there are chances of developing Septicaemia by the patient. According to him, the deceased had left for 36 days after receiving the injury. He has stated that he would not be able to say whether Septicaemia was caused because of the injuries suffered by the deceased on account of the assault or medical negligence. Lastly, he has stated that he was not able to say for sure whether the injuries received by the deceased were sufficient in ordinary course of of nature to cause death. He has also produced the post mortem report at Exh.17.

6. Considering the aforesaid medical evidence, it is clear that the deceased did not die immediately and lived for 35 days after receiving the injury. It also appears that in between the treatment, he had left the hospital against the medical advice. He ultimately died due to Septicaemia. No doubt that he could contract Septicaemia only because he had been assaulted and injured by the appellant; but it cannot be said that injury could not be a direct cause of death. Had there been no injury, there would not have been Septicaemia. However, the fact remains that he has died of Septicaemia. Though

according to the Doctor who initially treated the deceased, the injury suffered by the deceased was, in ordinary course, sufficient to cause death. It is an admitted fact that even after the initial treatment, he had survived for 35 days. Dr.Gosai, who performed the post mortem, has stated in his examination in chief that the injuries noticed by the deceased on the body were cumulatively as well as individually sufficient, in ordinary course of nature to cause death. He has, however, taken into consideration the injuries which were caused on account of the abdominal operation which was performed on the deceased during his hospitalisation. Later on, in the cross examination, he has admitted that without reading the case papers of the deceased, he would not be in a position to say whether Septicaemia was caused on account of the injury received as a result of the assault or the incisions made during the operation. He has also admitted that he was not sure whether such injuries would always cause death.

6.1 Thus, in the opinion of Dr.Gosai, the deceased had suffered injuries which may or may not result into death in ordinary course of the nature. In other words, according to him, the injuries were such that they were likely to cause death. When he speaks of the injuries he includes operational wounds also. However, even if the injury of the assault is taken into consideration, it is, in the opinion of the Medical Officer, likely to cause death. If that be so, in our opinion, the act of the appellant would not be covered under any of the Clauses of Sec.300 of IPC holding him guilty for committing offence under Sec.302 of IPC.

6.2 If that be so, and if the offence is not culpable homicide amounting to murder whether it would fall under Sec.304 Part-I or under Sec.304 Part-II. To decide this, it would be necessary to refer to the facts stated above. The incident took place when the deceased was placing the can containing diesel in rickshaw. The appellant went to him and caused injury on his abdomen and thereafter he ran away. The motive is stated to be that the appellant entertained an impression that Nazabhai i.e. the deceased, did not want to see the parties settling their disputes between them. However, the circumstances show that the appellant was in a position to inflict more than one blow, but he did not do so. Thus, if the appellant had entertained an intention to cause death or an injury likely to cause the death of the deceased, he would have inflicted more injuries, but that has not been done. In that view of the matter, even if the injuries are likely to cause death, it cannot be said that the appellant had

intended to cause such injury which was likely to cause death. It is also an admitted fact that the deceased had died after 35 days. Therefore, it can, at the best be, said that the appellant had knowledge that his act is likely to cause death of the deceased. In that view of the matter, the act would stand covered under Sec.304 Part-II and not under Sec.304 Part-I of IPC. In our considered opinion, the trial Court has, therefore, committed an error in holding the appellant guilty of committing offence under Sec.302 of IPC. As stated above, the act committed by him would saddle him with the liability of committing offence under Sec.304 Part-II of IPC. We, therefore, alter the said finding of the trial Court and instead, convict the appellant for offence under 304 Part-II of IPC. Consequently, the order of sentence of life imprisonment is modified and it is reduced to rigorous imprisonment for five years. We retain the sentence of fine imposed by the trial Court.

7. We are fortified in taking this view by the judgment of the Apex Court delivered in the case of Dashrath Singh v. State of U.P. reported in (2004) 7 SCC 408, wherein it has been held that even when the accused of that case had enough chance to inflict more injuries, that was not done and therefore, he did not intend to cause death. Again, the Apex Court has delivered a judgment in the case of Sarup Singh v. State of Haryana, reported in AIR 1995 SC 2452, on which Mr.Lakhani, learned Advocate has placed reliance. The relevant portion is reproduced as under:

"....He gave a single blow on the head of the deceased. The offence would, therefore, squarely fall under S.304 IPC. We accordingly hold him guilty of the said offence and convict him accordingly."

Mr.Lakhani also placed reliance on the decision rendered by the Apex Court in the case of K.Ramakrishnan v. State of Kerala, reported in AIR 1999 SC 1428, wherein it has been held as under:

"....Thus it is established beyond reasonable doubt that the appellant had given one blow but the blow no doubt was quite severe, as a result of which the intestines had protruded out. It is however crystal clear that the appellant had no animosity against the deceased and he was involved because of the altercations with PW-1. The scenario in which the appellant has been stated by the eye-witnesses to have given one

blow on the deceased, it is difficult for us to hold that he gave the blow in question either with the intention of causing murder of the deceased or he can have said to have the requisite knowledge that the death would otherwise be the inevitable result. In such a situation, even on accepting the prosecution case, we hold that the accused did not commit the offence under Section 302 but under Part II of Section 304 IPC. We accordingly, set aside the conviction of the appellant under Section 302 IPC and instead, convict him under Section 304, Part II....."

8. In view of the above, this appeal is partly allowed. The conviction of the appellant by order of the trial Court dated 7th Nov.2003 passed in Sessions Case No.57 of 1998 under Sec.302 is altered to one under Sec.304 of IPC Part-II. The sentence of life imprisonment is altered to R.I. for five years. The sentence of fine imposed by the trial Court is retained.

9. In view of the order in the main appeal, no order is required to be passed in the Criminal Misc.Application. Notice is discharged.

(Kshitij R.Vyas, J.)

Sreeram. (Akshay H.Mehta, J.)